Supreme Court, U.S.
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No. 95-751

In The

Supreme Court of the United States

October Term, 1995

MARITRANS OPERATING PARTNERS, L.P., *et al.*,

Petitioners,

v.

THE M/V BALSA 37, *et al.*,

Respondents.

Brief In Opposition Of Petitioners' Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Fourth Circuit properly conclude that LAR (b)(1) was consistent with Supplemental Admiralty Rule B and that the District Court had erred in failing to follow the plain reading of the Local Admiralty Rule?

LIST OF PARTIES

Tsacaba Shipping Co., Inc., is not a publicly held corporation. Dowa Line America, Inc., is a Delaware corporation and is a wholly owned subsidiary of Dowa Line Co., Ltd., Japan which is not a publicly held corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF CASE	1
REASONS FOR DENYING THE WRIT	3
I. The Opinion of the Court of Appeals is consistent with the only prior decision of a court of appeals on this subject	3
II. Local Rules have the force and effect of law and are binding upon the parties and the court which promulgated them	4
CONCLUSION	5

TABLE OF AUTHORITIES

Page

CASES

LaBanca v. Ostermuncher, 664 F.2d 65 (11th Cir. 1981) 3

RULES

Fed. R. Civ. P. Supplemental Admiralty Rule B.. 1, 2, 4

Local Admiralty Rule (b)(1) 2, 4, 5

Fed. R. Civ. P. 4(b) 4

STATUTES

Virginia Code Annotated Section 13.1-758 4

STATEMENT OF CASE

On August 11, 1993, the petitioner, Maritrans Operating Partners, L.P. ("Maritrans") filed a Complaint against the respondents in the United States District Court for the Middle District of Florida asserting that the M/V BALSA 37 was at fault in a maritime collision which occurred in the mouth of Tampa Bay. The petitioner alleged that the appellant was liable for the physical damages caused by the collision, as well as anticipated liability to third parties arising from the resulting oil spill. On August 17, 1993, petitioners, Bouchard Transportation Co., Inc., Tug Capt. Fred S. Bouchard Corp., and Barge B. No. 155 Corp. ("Bouchard") filed a similar complaint against the respondents in the United States District Court for the Middle District of Florida based upon the same incident.

On August 19, 1993, Maritrans and Bouchard sought from the United States District Court for the Eastern District of Virginia, Norfolk Division, orders under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") directing the Clerk to issue process of attachment on the M/V BALSA 39, a sister ship of the M/V BALSA 37, which was also owned and/or operated by the respondents. Petitioners furnished the court with Verified Complaints and sworn affidavits stating that the respondents could not be found within the District and that diligent efforts had been made to locate the respondents within the District without success. The District Court issued the requested order. The M/V BALSA 39 was arrested by the United States Marshal after passing through the Virginia Capes and while inbound for Baltimore. The Marshal was accompanied on-board the vessel by a Hampton Roads pilot. The MV

BALSA 39 was diverted from her voyage to Baltimore and taken by the Marshal to a berth at Newport News, Virginia.

On August 20, 1993, the respondents moved the court below to quash the writ of attachment on the grounds that the respondents could be found within the District within the meaning of Rule B. The court denied the motion. On August 23, 1993, the respondents asked the court to reconsider respondents' Motion to Quash and/or set a bond for the release of the M/V BALSA 39. In its renewed motion, the appellants pointed out to the court that it had found respondents were doing business in Virginia and, if that were the case, then under the provisions of Local Admiralty Rule (b)(1), respondents were subject to service of process by serving the statutory agent, the Secretary of the Commonwealth or the Clerk of the State Corporation Commission. The court rejected respondents' argument on the grounds that to so hold would frustrate the intent of the purpose of Rule B.

By Order dated August 31, 1993, the court below found that its decision not to vacate the attachment of the M/V BALSA 39 involved a controlling question of law as to which there was substantial grounds for difference of opinion and that an immediate appeal from the Order could materially advance the termination of litigation. The District Court certified the following question to the Court of Appeals:

> If the defendants are correctly found by the court to be doing business in this District at the time of a Rule B attachment, should Local Admiralty Rule (b)(1) be read in conjunction with Supplemental Admiralty Rule B so as to render

> the availability of service upon the Clerk of the Virginia State Corporation Commission as meaning that the defendants may be found within the District as that term is used under Rule B. If the answer is in the affirmative, the attachment must be quashed.

The matter was fully argued before the United States Court of Appeals for the Fourth Circuit on April 13, 1994. On September 5, 1995, that Court rendered its opinion holding that where a federal rule and the local rule are not inconsistent the clear language of the local rule must be followed. The ruling of the District Court was reversed and the attachment of the M/V BALSA 39 quashed and vacated.

REASONS FOR DENYING THE WRIT

Petitioners' Petition for a writ of certiorari should not be granted as there are no special or important reasons which call for exercise of this Court's power of supervision. The opinion of the Court of Appeals for the Fourth Circuit is consistent with the only other appellate court case on this subject.

I. The Opinion of the Court of Appeals is consistent with the only prior decision of a court of appeals on this subject.

The decision of the Fourth Circuit in this matter is fully consistent with the decision of the Eleventh Circuit in *LaBanca v. Ostermuncher,* 664 F.2d 65 (11th Cir. 1981). In the *LaBanca* case the Court held that a defendant was not

"found within the district" where there was a statutory agent who could be served but that statutory agent was not subject to process in the district in which attachment was sought. Thus the Eleventh Circuit indicates that if that statutory agent had been within the district where attachment was sought, then the defendant would be "found within the district". This would be the same result reached by the court below.

II. Local Rules have the force and effect of law and are binding upon the parties and the court which promulgated them.

The Eastern District of Virginia has by LAR(b)(1) defined the clause "not found within the district" for cases in its jurisdiction as follows:

> LAR(b)(1) "not found within the district" defined. A defendant is considered to be "not found within the district" if, in an action in personam, the defendant cannot be served with a summons and complaint as provided in Federal Rule 4(d).

This rule is clear and unequivocal. It states simply that if a summons or complaint can be served on a statutory agent for the defendant as provided in Federal Rule 4(b) then that defendant is found within the district.

Rule 4(b)(3) provides that service can be effected on a foreign corporation by serving a statutory agent authorized by law to accept service of process.

Virginia Code annotated Section 13.1-758 appoints the Clerk of the State Corporation as a statutory agent to

accept service of process of corporations transacting business in Virginia and which corporations are without a Certificate of Authority to do business in Virginia and when no director, officer, or agent of the corporation is found in Virginia.

There is only one interpretation that can be given to LAR(b), i.e., if the defendant can be served by service on a statutory agent then that defendant is within the district for the purposes of service of process. The attachment in question was sought under Supplemental Admiralty Rule B(1) which permits in a maritime claim attachment of a defendant's goods found within the district if the defendant shall not be found within the district if the defendant shall not be found within the district.

These rules are not inconsistent, they are complementary. The language of both rules is clear and unequivocal.

As was concisely stated by the Appellate Court below, "where the Federal Rule and Local Rule are not inconsistent, which these are not, the clear language of the Local Rule dictates our decision, . . . "

CONCLUSION

Based upon the foregoing authorities, argument, and the clear and unequivocal wording of the Federal Rule and Local Admiralty Rule here involved, respondent respectively submits that the petition for writ of certiorari must be denied. The language of the Local Admiralty Rule and the Federal Rule here involved are clear and unequivocal. The opinion of the Court of Appeals for the

Fourth Circuit is consistent with a previous opinion for the Court of Appeals for the Eleventh Circuit, the only other appellate court which has spoken on this subject. There are no other special or important reasons which call for an exercise of this Court's power of supervision.

Respectfully submitted,

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